Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
and	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS OF IP COMMUNICATIONS CORPORATION ON FIFTH FURTHER NOTICE OF PROPOSED RULMAKINNG IN CC DOCKET NO. 96-98

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On August 10, 2000, the Federal Communications Commission ("FCC") issued its Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98 ("*NGDLC Unbundling Notice*" or "Notice"). In that notice, the FCC seeks comment regarding the unbundling of next generation digital loop carriers ("NGDLC"). IP Communications Corporation ("IP") is a Digital Subscriber Line ("DSL") Competitive Local Exchange Carrier ("CLEC") (collectively referred to as a "DLEC") that will be immediately affected by the FCC's *NGDLC Unbundling Notice* and the eventual order on that notice. IP filed initial comments on October 12, 2000 and hereby files reply comments pursuant to the schedule noticed by the Commission.

INTRODUCTION AND SUMMARY

In its initial comments, IP demonstrated that the proper unbundling of NGDLCs is critical to meeting the parity requirements of FTA § 251, opening markets to competition as required by FTA § 271, and the advancement of advanced services as sought by FTA § 706. It was IP's intent to show that while expansion of NGDLCs can provide new opportunities, such

deployment must be made in compliance with Sections 251 and 252 of the Federal Telecommunications Act ("FTA") to avoid creating new barriers to competition.

In these reply comments, IP will respond to certain assertions made in comments of other parties. In particular, because SBC Communications, Inc. ("SBC") appears to be the incumbent local exchange company ("ILEC") that focused most heavily on the unbundling issues, as opposed to the collocation further notice of proposed rulemaking ("FNPRM"), these reply comments will largely respond to the comments of SBC.

I. APPLICATION OF THE NECESSARY AND IMPAIR STANDARD

A. Status after the UNE Remand Order

SBC comments appear to start from the position that there are no existing unbundling requirements relating to NGDLCs; this is clearly not a correct reading of the *UNE Remand Order*.[1] Paragraph 313 of the *UNE Remand Order* explicitly addressed this issue. Although in a number of proceedings SBC attempts to create hurdles to CLEC access that do not exist, the language of Paragraph 313 speaks for itself:

> Accordingly, incumbent LECs **must** provide requesting carriers with **access to unbundled packet switching in situations** in which the incumbent has placed its **DSLAM in a remote terminal**. . . [Emphasis added.] . . . . . Para. 313.

> The incumbent will be **relieved** of this unbundling obligation **only if** it permits a **requesting carrier to collocate its DSLAM** in the incumbent's remote terminal, **on the same terms and conditions that apply to its own DSLAM.**" . . . . . [Emphasis added.] . . . . . Para. 313.

[1] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 and CC Docket No. 96-89, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, ("*UNE Remand Order*")

The most obvious point in Paragraph 313 is that this Commission has already determined that the general rule is in favor of unbundling. Moreover, in reaching the unbundling decision, this Commission would have already applied the "necessary and impair" standard to find that by definition, CLECs will be impaired unless the ILEC can overcome the unbundling presumption by proving adequate grounds for relief.

As a result, in a NGDLC architecture, like SBC's Pronto – the name given to SBC's NGDLC deployment – it should be uncontroverted from the record in 98-141 that CLEC digital subscriber ling analog multiplexers ("DSLAM") will not operate pursuant to the same terms and conditions as SBC's equipment. Examples, such as SBC's equipment being hardwired to copper while CLECs will be required to suffer increased costs, delay, and uncertainty by being required to order what SBC calls an engineering control splice ("ECS"), demonstrate this point. Similarly, SBC's DLC equipment shares the economies of the incumbent LEC's network because the ILEC equipment deployed is mostly used to provide plain old telephone service ("POTS"). Such leveraging of the voice network is only available to the ILECs as a vestige of their historic monopoly position. Finally, collocation space will not be available for any remote terminal cabinet deployed prior to September 15, 2000. All of these facts, demonstrate that the "necessary and impair" standard was already applied to unbundle SBC's NGDLCs in the *UNE Remand Order*. For SBC, the issues in this rulemaking from the FCC's perspective should be not "if" the architecture is to be unbundled since the FCC's prior *UNE Remand Order* mandates unbundling. This proceeding instead should answer questions as to the degree of unbundling and the appropriate obligations to assure that unbundling assures parity access to competitors.

B. CLEC Impairment

Even if the "necessary and impair" test were being applied anew, impairment was clearly demonstrated in IP's initial comments. SBC seems to suggest that the lack of unbundling will not impair CLECs. SBC's arguments are based on the alleged availability of vendors willing to sell DSLAM equipment. SBC's comments, giving the benefit of the doubt, unintentionally miss the point.[2] Contrary to SBC's claims, there is a bottleneck. Moreover, the bottleneck results, in part, to the integration of the existing incumbent voice and data networks. As SBC is aware, to provide advanced services, the availability of the equipment used is often less important than the location of the equipment. With the deployment of NGDLCs, ILECs, such as SBC, are incorporating next generation equipment into their existing networks. For example, in numerous situations, the ILEC will be retrofitting existing equipment. As such, the next generation equipment will be using existing copper, existing fiber, existing rights of way, and sharing the economies with the embedded base of voice customers. As alluded to in IP's initial comments, IP points this out as a fact, not a complaint. ILECs, like SBC, cannot economically deploy NGDLCs if they are prohibited from making use of their existing networks in this manner. In other words, they would be impaired from providing advanced services to a large percentage of their potential customer base. SBC, for example, has estimated that without Pronto, SBC loses access to 50% of the potential customer base for advanced services.

On the other hand, the fact that incumbents would be impaired from deploying NGDLCs without sharing the economies of the existing network, should more than demonstrate that if the ILECs would be impaired, so certainly would competitors particularly given that the ILECs have

[2] The following response showing that there is more to a review of impairment than equipment availability, such as the ability to economically incorporate the equipment into the network and the provisioning, unbundling, and liability issues that follow, also relates back to arguments in IP's initial comments regarding splitter ownership. For example, when data providers are forced to own the splitters, they are forced to be in the middle of the voice circuit with all of the potential litigation associated with voice cervices, including the potential for 9-1-1 related litigation. Such potential litigation would not be faced by a provider only providing data services. Under no circumstances would it be reasonable for a data provider be forced to tak on voice related liability simply because the ILEC forced a necessary piece of equipment to be owned by the data provider. Such additional costs are material and in some cases can be cost prohibitive. Obviously, when an ILEC is providing the data component it will already have voice-related liability any way. Thus, there is no incremental cost to the ILEC data provider.

nearly all of the existing residential and small commercial voice customers carried over their networks, either through retail, UNEs, or Resale, as a vestige of their historic monopoly position.

Where SBC is disingenuine is to point to the availability of equipment in the marketplace while disregarding the extreme costs associate with deployment. As explained above, even the incumbents cannot afford to start from scratch. To deploy next generation equipment, whenever SBC uses existing facilities whenever possible. CLECs will be impaired if they cannot do the same, and the way CLECs accomplish this task is through unbundling. IP included the following discussion in its initial comments:

> Hence, competitors based on SBC's initial design of Project Pronto could have needed to up to 100 additional collocation installations – each to serve a small subset of the office's potential demand.[3] **At approximately $500,000 per adjacent collocation, a CLEC could be faced with $50,000,000 to ubiquitously cover one central office.** Even in situations where CLECs have access to copper at the remote terminal ("RT") that houses the NGDLC, the number of RTs per central office can exceed 20. Consequently, a CLEC would be required to collocate in or adjacent to up to 20 RTs as compared to one central office. Moreover, other unforeseen costs will be likely.[4]

There is a very real potential that CLECs will be faced with such an economic decision without sufficient NGDLC unbundling. As an example, IP points to the Comments of BellSouth. At page 18, BellSouth completes its argument to have adjacent collocation as the preferred collocation option for CLECs. At the costs cited, broad-scale adjacent collocation will never be an option for a business plan, only a bankruptcy filing. Moreover, the ILECs do not point to the adverse affects of the uneconomic duplication of the ILEC DLCs. Where appropriate, adjacent

[3] See also page 4 of SBC's original Investor Briefing regarding Project Pronto, which states that SBC will "place or upgrade approximately 25,000 remote terminals" creating "neighborhood broadband gateways to about 1,400 central offices throughout SBC's 13-state territory". Thus, using SBC's numbers, there will on average be almost 18 RTs with NGDLCs per office. Working with an 18 average, a CLEC would still be looking at $9,000,000 to construct adjacent collocations at an average central office. Moreover, the trend is to add additional RTs to existing central offices rather than building new central offices.

[4] And while IP does not suggest that every central office has this many remote terminals, the Austin, Texas central office is a good example because it is a market that competitive data providers believe provides a good business opportunity.

collocation can be a very effective tool. However, where artificially required, CLECs, like IP, that ordinarily do not dig up the streets, will be required to obtain municipal franchises and seek municipal permission for each and every adjacent collocation. All the while, the incumbents and their advanced services affiliates lock-up the market. Again to reiterate, the ILECs will most often be able to use existing rights of way to bypass this requirement. Moreover, the ILECs generally have an existing relationship with the municipalities that assists in obtaining new rights of way.

Finally in this area, SBC amazingly points to the fact that CLEC DSL growth rates are generally higher today than ILEC DSL growth rates as part of its unusual argument attempting to show that CLECs do not need fair access to the other 50% of the ILEC customers. This statement is amazing since such high CLEC growth rates are largely related to the discrimination cited by this Commission in its *Line Sharing Order* since ILECs were able to build an initial base through line sharing with itself while the same ILECs refused to line-share with CLECs.[5]

II. OVERSTATED ARGUMENTS REGARDING A "CHILLING" AFFECT

At page 56 of its comments, SBC suggests that the unbundling requirements would have a chilling affect on NGDLC deployment. This is a hollow threat. As Commission Furchtgott-Roth notes in his dissent to the recent *Pronto Modification Order*, SBC had been developing its NGDLC architecture since 1998, announced Pronto only days after the Commission released its order approving the merger, and "that it was entirely foreseeable, at the time the conditions were being negotiated, that SBC would not be able to pursue its plan for deploying digital subscriber line services consistent with the merger conditions."[6] Yet, without disclosing any information to the FCC, it agreed to merger conditions knowing that it would later need a modification.

[5] Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 99-355 (rel. Dec. 9, 1999) ("Line Sharing Order").

Similarly, the Pronto deployment moved forward in spite of the existing language regarding DLC unbundling in the *UNE Remand Order*. Finally, ILECs are in the business of selling services and facilities. Whether on a retail basis or through UNEs, ILECs, like SBC, will be attempting to develop new revenue streams with their facilities. Moreover, since much of an ILEC's NGDLC architecture will benefit from existing DLC remote terminals, fiber, copper, and rights of way, we are talking about additional revenues from the an architecture that is largely built out of sunk investment.

The fact that SBC is willing to engage in such threats demonstrates even further why unbundling requirements are necessary. While this Commission at a macro level can more easily dispense with such propaganda for what it is, the task is more difficult for an individual state. For an individual state, an ILEC can play the "take my marbles and go home" tact to teach a lessen to that state and others. SBC has already done this in Illinois. SBC is simply trying to create a "Prisoner's Dilemma" scenario for the states. This Commission through its national rulemaking authority can defeat such a strategy. Moreover, until such policies are in place, CLECs cannot build a business case and obtain necessary financing when an ILEC offering can be pulled away at any time. Again using SBC as an example, the take-it or leave-it contract SBC provides for its broadband service reserves the right for SBC to withdraw the offering at any time.

III. UNBUNDLING OF DENSE WAVELENGTH DIGITAL MULTIPLEXING

Beginning on page 57, SBC begins its contention that dense wavelength digital multiplexing ("DWDM") unbundling is premature. Ironically, SBC's arguments prove one of IP's key arguments in its initial comments. SBC argues the issue of DWDM unbundling should

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[6] Dissenting Statement of Commissioner Harold Furchtgott-Roth to SBC's *Pronto Modification Order.*

not be addressed now because SBC will not be deploying DWDM transport until next year. A number of points in response require elaboration.

First, the effect of SBC's argument is to wait until SBC and its incumbents have a head start and can frame the issue based on deployment characteristics once it is too late to change the equipment. So, for example, should this Commission wait and SBC, as it has done with Pronto, implements a facilities deployment that wrongfully creates unnecessary points of technical infeasibility for unbundling, SBC's response down the road will be, "golly gee, I wish I could unbundled DWDM but it just so happens that the technology I deployed from vendor X just will not accommodate unbundling" or will only accommodate unbundling if "gerry-rigged", like the Pronto engineering controlled splice ("ECS"), in a manner that will be expensive, operationally difficult, and inefficient.

The point here is when, as with DWDM, the Commission has the opportunity to act ahead of the deployment curve, the Commission should seize the opportunity before regulatory lag harms CLECs in the intervening time period. So, in the situation on DWDM, the Commission should require unbundling. In the context of transport as discussed by SBC, DWDM is simply a tool to provide transport, which has already been unbundled. Regardless of the fact that ILECs may use a new technology to more cost effectively provide the existing unbundled network element in lieu of laying new fiber, the issue should not be whether to unbundle but instead whether the provisioning of transport UNEs with DWDM technology creates the need for any new terms, conditions, or lower rates due to new efficiencies.

The additional point to raise is that SBC's comments illustrate another concern raised in IP's initial comments. This Commission asked for comments regarding the types of notice requirements and network management requirements that are appropriate. In response, IP noted, using SBC's NGDLC deployment – "Pronto" as an example, that CLECs not only require

adequate notice but also need to be involved during the ILEC's preliminary deployment process to assure that the incumbent is providing requirements to vendors that facilitate required unbundling rather than obstructing. The point made by IP in those comments was that the stealth development of a product, which has architected within it anticompetitive limitations that were not necessary, should never happen again. What we see in SBC's comments is that this kind of stealth deployment that tends to create a "take-it or leave-it" attitude after the fact will be SBC's standard method of operating if given the opportunity. SBC's comments demonstrate again its intent to deploy and "ask forgiveness" if necessary, rather than work with its wholesale customers to assure that the goals of the act are met.

Not only is this type of approach counter to the way a wholesale provider should treat its customers, it appears to be in violation of Section 256 of the FTA. And while IP will not raise the issue in this proceeding as to whether SBC's conduct in deploying Pronto was a violation of Section 256, the critical point for this proceeding is that this Commission, when answering the questions asked in the FNPRM, consider all of the authority delegated to it by Congress in the FTA, including Section 256, to assure that such conduct not continue by providing clear guidance as to federal requirement for cooperative planning and deployment.

Specifically, Section 256 authorizes the Commission to "provide nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks used to provide telecommunications service through – (A) coordinated public telecommunications network planning and design by telecommunications carriers and other providers of telecommunications services."[7]

[7] FTA § 256(a).

IV. NOTICE TO CLECS REGARDING NEW FIBER FACILITIES

As noted above, CLECs like ILECs require advanced notice to adjust their business plans as the ILEC network architecture changes. Without such notice, CLECs will be limited in their ability to plan their businesses. While ILECs will have knowledge of network changes and will be able to adjust their marketing and service offerings to account for future changes, CLECs will be left behind always trying to play catch-up after the fact. Such discrimination is in violation of 251(c) and 256(a). ILECs are required to provide nondiscriminatory access to loops, including their features, functionalities, and capabilities. Without adequate notice, CLECs will not be able to access the functionality of the new loop plant on a parity basis with the incumbent, i.e. it is not helpful to have parity unbundling requirements if the CLEC is a month behind in submitting orders due to the lack of parity information.

Regarding the amount of advanced notice, the CLEC deserves as much advance notice as the ILEC. CLECs should be informed no later than when requests for proposals (RFPs) are drafted/issued to vendors, as soon as vendors are selected, and should receive deployment updates contemporaneously with the ILEC receiving them from its vendors. Only with such notice will CLECs be able to engage in near and long term deployment and financial planning at parity with the incumbent.

V. MULTIFUNCTION EQUIPMENT

In SBC's comments, SBC suggests that the fact that equipment is used to provide voice and data services should not be considered by this Commission. It is interesting that SBC, who generally argues for a fact-based approach for analyzing unbundling requirements, wishes that the FCC ignore particular facts. Could it be that if those facts are considered, they would argue for unbundling? Of course. As was discussed above, it is the economies of providing voice and data services that makes the deployment of NGDLCs economical. And it is the same lack of

economies enjoyed by competitors as opposed to vestige monopolists that impairs a CLEC's ability to replicate the ILEC NGDLC deployment. The FCC must consider the very real facts that are relevant in the real world. When looking at the realities including the leveraging of the voice market, it becomes clear that CLECs are not in a position to replicate ILEC deployments.

Also, it should be noted that IP has been informed that in a recent Ameritech proceeding Carol Chapman, the SBC 13-state DSL policy witness, confirmed that only a company with the size and resources of SBC could expect to be able to effectuate such a deployment.[8]

VI. EQUIPMENT BEING READILY AVAILABLE

To respond briefly, beginning on page 62, SBC returns to the notion that if equipment is "readily" available from vendors the unbundling obligation does not exist. IP has already explained in these comments that other factors such as location, deployment realities, leveraging off of / integration with the voice network, ect., all must be considered. It is illustrative to note that CLECs can purchase copper from vendors as well. Yet, it would be absurd to suggest that such availability of copper on the open market alleviates the need for ILECs to unbundle copper loops. Absurd because the economics of laying new copper and digging up the streets to lay it is cost prohibitive. The same is true with regard to NGDLC as explained above.

VII. SBC's ALLEGATIONS THAT UNBUNDLING WILL DIMINISH CAPACITY

On page 63, SBC suggests the horribles that unbundling will cause, i.e. SBC argues that without it being the paternal figure, CLECs will prematurely exhaust capacity diminishing the number of customers that can be served. SBC's arguments are easily addressed.

In IP' initial comments, IP proposed the following process to address issues such as diminished fiber capacity:

[8] As of the filing of these comments, IP has not been able to obtain a copy of the transcript to confirm its understanding of Ms. Chapman's testimony.

> Should there be concerns raised by ILECs or CLECs that a particular use is degrading the use to others, those ILECs and CLECs should be able to petition the appropriate state regulatory commission seeking authority to prevent a particular use by ***any carrier***. The state proceeding would focus on the goals of Section 706 by balancing the benefit of expanding the availability of advanced services generally and the benefit of expanding the availability of a variety of advanced services. Both benefits are consistent with Section 706. Should a situation arise where these two benefits are in conflict, the state commission can balance the relative affects.

This proposed process should fully address SBC's concerns regarding fiber utilization while allowing the flexibility necessary for providers to develop new service offerings. Moreover, the process is open-ended enough to be used in other circumstances where one carrier's use interferes with another.

VIII. ACCESS TO SUBLOOP

SBC's answer on page 64 is carefully crafted to avoid the key concern that CLECs have with SBC's Pronto deployment. SBC has, in effect, redefined what subloop is. In the Pronto architecture, SBC argues that the copper segment from the NGDLC to the serving area interface ("SAI") is not subloop. Under SBC's definition, it provides access to subloop because the section that it refuses to unbundle has been defined by SBC to not be subloop.

The truth is that SBC is not providing access to all of the copper including the copper subloop segment between the NGDLC and the SAI. A review of IP's initial comments includes greater detail as to how SBC has architected its NGDLC deployment in an anticompetitive manner that has led to such denied access.

CONCLUSION

As stated in IP's initial comments, not only is a forceful and clear order necessary to alleviate unnecessary litigation to "clarify" this Commission's mandates, CLECs require a timely decision. SBC's NGDLC architecture is already operational in many areas. CLECs, as a result, are already behind the eight ball. Other ILECs are moving forward with their deployment plans. By addressing the critical planning, management, and unbundling issues addressed in IP's initial and reply comments ***by the end of the year***, this Commission can move the ball forward before CLECs are so far behind that they cannot catch up.

Respectfully submitted,

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